ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	GN Docket No. 93-252
Implementation of Sections 3(n) and 332 of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

COMMENTS OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

Mark J. Golden
PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION
1019 19th Street, N.W.
Washington, D.C. 20554
(202) 467-4770

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SUMMARY

This proceeding continues the Commission's extensive efforts to implement amendments to Sections 3(n) and 332 of the Communications Act by addressing the impact of the statute on technical, operational, and licensing rules for mobile services. PCIA's specific positions creating comparable regulations for substantially similar services are summarized below:

- PCIA supports not only ensuring symmetrical regulatory treatment of competing mobile service providers, but also promoting further competition and economic growth and establishing an overall appropriate level of regulation for such services. In particular, the Commission should give special consideration to a number of measures suggested by PCIA for improving the speed of application processing generally.

- PCIA concurs with the Commission that examination of consumer demand-based and service-oriented factors should appropriately lead to "substantially similar" CMRS product categories reflecting market realities, as well as the specific conclusions that: (1) wide-area SMR service and cellular service and (2) private and common carrier paging should be deemed substantially similar for statutory purposes.

- PCIA opposes a general CMRS spectrum cap in favor of service-specific aggregation rules. A spectrum cap would unduly constrain carriers' flexibility to enter new wireless markets without any identifiable public interest benefit. The cap proposal raises serious questions of practical implementation that underscore the problematic nature of the proposal but also require considered evaluation if the proposal is pursued.

- While the suggestion to adopt Part 22-based assignment procedures for CMRS will achieve a degree of comparability, PCIA believes it is imperative for the Commission to adopt market area licensing for paging and other mobile telephone service on an expedited basis. PCIA also supports allowing licensees further flexibility to make minor system changes without prior Commission approval or notification.

- PCIA supports conforming height/power limits for functionally similar services by raising height/power limits to a uniform threshold.

- PCIA generally concurs with the FCC's approach of eliminating technical modulation requirements in favor of relying on emission mask requirements. PCIA suggests also

permitting additional flexibility in cases where the same entity operates two or more adjacent channels.

- PCIA supports the proposed 12 month basic construction timetable for all CMRS licensees, but urges redefining how licensees are to demonstrate availability of service to the public. PCIA also cautions that in some cases an extended implementation period may be warranted, and further suggests adopting a uniform 90 day period to conform the rules applicable to temporary discontinuance of service.

- PCIA supports eliminating both loading requirements and traffic studies.

- PCIA supports eliminating all user eligibility limitations for CMRS providers.

- PCIA supports eliminating restrictions on permissible communications, as well as permitting liberalized use of common or private carrier facilities for incidental and auxiliary communications.

- PCIA supports eliminating station identification requirements where interfering facilities can be identified from Commission records, and suggests, for other cases, revising the requirement to once an hour on or near the hour.

- PCIA concurs that general licensee obligations are already similar, but suggests that certain practices allowing greater division of responsibility between a licensee and a system manager could be beneficial to the development of the wireless market.

- PCIA supports the Commission's extension of EEO obligations to all CMRS carriers, but believes it may be appropriate to revisit the 16 employee exemption.

- PCIA believes the CMRS rules should accommodate the optional licensing of standby facilities for all CMRS operators.

- PCIA supports the concept of a single modular application form for use by all CMRS and PMRS applicants, but suggests that it may be more appropriate to address the actual content of such a form after the technical rules rewrite proceeding is completed. PCIA also recommends that the Commission adopt a new notification of status of facilities form, provide computer-generated notifications near the end of the construction period requesting confirmation that construction has been completed, create a uniform form for transfer and control applications, and adopt other speed of processing reforms suggested in the *Part 22 Rewrite*.

- PCIA supports achieving regulatory parity by requiring all CMRS licensees to pay licensing and regulatory fees on the same basis.

- Although the *Budget Act* leaves very little subject to discretion regarding the application of Section 309 licensing procedures to CMRS, PCIA suggests: carefully limiting what constitutes "major" modifications or amendments; adopting the Part 22 procedures for modification of existing authorizations; and adopting restrictions limiting monetary payments to third parties to settle contested proceedings.

- PCIA suggests more general reforms to extend opportunities for pre-construction of CMRS facilities.

- PCIA believes the Commission should explore means of allowing pre-authorization operation of CMRS facilities and suggests considering the use of blanket STAs to permit operation of facilities after public notice of the underlying facilities application.

- PCIA supports the proposed license term of ten years for all CMRS licensees, along with extension of the cellular and PCS renewal policies to all CMRS operators.

- PCIA supports measures to deter speculative filings, but believes that, in a competitive bidding environment, the Commission should generally permit free alienation of licenses.

- PCIA urges adoption of policies extending comparable flexibility to provide both CMRS and PMRS offerings to all CMRS licensees.

- PCIA supports provisions for a "finder's preference" in order to recapture unused spectrum.

- PCIA submits that the Commission should permit licensing of up to 99 transmitters per call sign on a basis consistent with or similar to the current Part 22 process.

- PCIA believes that comparable forfeiture standards must be applied to all CMRS licensees, but also suggests revising the forfeiture guidelines in recognition of the effects of the minimum forfeiture provisions on the large number of small CMRS operators.

- PCIA believes the microfiche requirement should be eliminated in its entirety in favor of electronic filing procedures. In the interim, the burden of microfiche filing should be reduced, not expanded as the *Part 22 Rewrite* proceeding proposed, and comparable requirements should apply to all CMRS licensees.

- To achieve regulatory parity, PCIA believes the Commission necessarily must also address rule changes to the Part 21 and Part 94 rules, which could be undertaken in a *Third Notice of Proposed Rulemaking* in this proceeding.

PCIA believes that these changes, detailed below, will streamline administrative processing, accord further flexibility to licensees, and smooth the transition to a fair and level playing field in commercial mobile radio services.

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COMMENTS

The Personal Communications Industry Association ("PCIA") herewith submits its comments in response to the above-captioned *Further Notice of Proposed Rulemaking*.[1] In this *Further Notice*, the Commission has provided an exhaustive catalog of proposed changes necessary to achieve comparable regulatory treatment for substantially similar Commercial Mobile Radio Service ("CMRS") operators. As discussed below, PCIA largely supports the changes proposed by the Commission as being well-tailored to meet the goals of Sections 3(n) and 332 of the Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993.[2] In a number of instances, however, PCIA offers additional suggestions for regulatory reform, in many cases derived from consensus positions in the *Part 22 Rewrite* proceeding, that could offer significant benefits for all CMRS providers. PCIA urges the Commission to adopt these proposed changes, and to consider how best to rectify a few additional rule disparities that are not addressed by the *Further Notice*.

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[1] Regulatory Treatment of Mobile Services, FCC 94-100 (May 20, 1994) ["*Further Notice*"].

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Tit. VI, § 6002(b)(2)(A)(iii), 107 Stat. 312, 393 (1993) ["*Budget Act*"].

I. INTRODUCTION

This proceeding continues the Commission's extensive efforts to implement amendments to Sections 3(n) and 332 of the Communications Act embodied in the *Budget Act*. Earlier, the Commission adopted a *Notice of Proposed Rulemaking*, received comments, and issued both a *First Report and Order* and *Second Report and Order* to implement the basic provisions of the legislation.[3] With the *Further Notice*, the Commission is now attempting to address the impact of the statute on technical, operational, and licensing rules for mobile services, particularly rules affecting the former private land mobile services that have been reclassified as CMRS. Because the *Budget Act* "establishes a one-year period from the date of enactment, *i.e.*, until August 10, 1994, for [the FCC] to make such changes,"[4] the Commission has set a very aggressive pleading schedule for this rulemaking.

The Commission has recognized that this proceeding offers not only an opportunity "to ensure symmetrical regulatory treatment of competing mobile service providers," but also "to promote further competition and economic growth in the mobile services marketplace" and "to establish an appropriate level of regulation to protect mobile service customers."[5] In this regard, PCIA believes that the FCC should give special consideration to measures designed to enhance speed of application processing. PCIA has suggested, in a number of places, reforms that are designed both to achieve greater efficiency and to minimize

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[3] *See* Regulatory Treatment of Mobile Services, 8 FCC Rcd 7988 (1993) ["*Notice*"]; 9 FCC Rcd 1056 (1994) ["*First Report and Order*"]; 9 FCC Rcd 1411 (1994), *erratum* Mimeo No. 92486 (rel. Mar. 30, 1994) ["*Second Report and Order*"].

[4] *Further Notice*, ¶4.

[5] *Id.*, ¶1.

unnecessary filings that would benefit all CMRS licensees and ease the burden on the Commission's staff.

In furtherance of Commission's efforts in this proceeding, PCIA notes that the FCC has already collected a useful record in connection with its *Part 22 Rewrite*, *Part 90 Refarming*, *Expanded Mobile Service Provider*, and *900 MHz Phase II* proceedings.[6] PCIA urges the Commission to draw upon the filings in these proceedings -- to the extent relevant -- to aid in its consideration of how to improve licensing and other policies in a post-*Budget Act* regulatory environment. PCIA also notes that, in advance of the adoption of the *Further Notice*, its membership had already begun forging consensus as to what rule changes would be necessary to conform elements of both the Part 22 and Part 90 rules and what steps would be necessary generally to improve upon those rule parts, with the intent to enhance the competitiveness of the CMRS marketplace and to facilitate expeditious Commission processing of all applications. PCIA discusses these proposals in detail below.

II. DEFINING "SUBSTANTIALLY SIMILAR" SERVICES AND "COMPARABLE REQUIREMENTS" FOR REGULATING SUCH SERVICES

The *Budget Act* directs the Commission to ensure that "licensees in [the CMRS] service are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common

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[6] *Part 22 Rewrite*, 7 FCC Rcd 3658 (1992) ["*Part 22 Rewrite Notice*"]; *Part 90 Refarming*, 7 FCC Rcd 8105 (1992) ["*Refarming Notice*"]; *Future Development of SMR Systems in the 800 MHz Frequency Band*, 8 FCC Rcd 3950 (1993) ["*800 MHz EMSP Notice*"]; *900 MHz Phase II*, 8 FCC Rcd 1469 (1993) ["*900 MHz Phase II Notice*"].

carrier services."[7] As the Commission has noted, this mandate requires first identifying the CMRS offerings that are "substantially similar" and then determining "comparable requirements" for regulating such services. Bearing in mind the ultimate goal of eliminating regulatory disparities between competitive services, PCIA offers below the following general considerations to guide these inquiries.

A. Defining What CMRS Offerings Should Be Considered "Substantially Similar"

One of the Commission's goals in this proceeding is to accord comparable regulatory treatment to "substantially similar" CMRS offerings. The FCC has proposed, for purposes of this proceeding, that the definition of "substantially similar" focus on whether the CMRS providers in question compete to meet similar customer needs and demands,[8] but that consideration also be given to:

- "[W]hether service providers claim that their service is substitutable for common carrier service";
- "[W]hether customers are actually choosing between two services when deciding which mobile service to use"; and,
- The respective market strategies adopted by the service providers and "factors a customer considers when choosing a service."[9]

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[7] *Budget Act*, § 6002(d)(3)(B).

[8] *Further Notice*, ¶13.

[9] *Id.*, ¶14.

PCIA supports the use of the above factors enumerated by the Commission. Because the FCC's "role is to establish a regulatory regime under which the marketplace . . . shapes the development and delivery of mobile services," examination of these demand-based factors should appropriately lead to "substantially similar" CMRS product categories reflecting market realities.

PCIA also supports the Commission's initial application of the substantial similarity factors to specific reclassified Part 90 services. In particular, PCIA concurs with the Commission's tentative conclusions that:

- "Wide-area SMR service and cellular service [should] be viewed as substantially similar for purposes of the statute."[10]
- "[P]rivate and common carrier paging should be deemed substantially similar for statutory purposes."[11]

These tentative conclusions are borne out by both Congressional intent and a rational examination of today's wireless marketplace and should be affirmed.

B. Creating Benchmarks for Determining What Constitutes "Comparable" Regulatory Requirements

The *Further Notice* requests guidance in developing general benchmarks for determining what constitutes "comparable" regulatory requirements under the *Budget Act*. The Commission appropriately recognizes that the touchstone for any such assessments must be the elimination of regulatory disparities that might affect the future course of competition

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[10] *Id.*, ¶15.

[11] *Id.*, ¶19.

between providers of substantially similar services. At the same time, however, Congress has provided the Commission with some leeway and not required strict uniformity of regulation. Under the circumstances, the FCC has solicited comment on what general policies should govern assessments of comparability.

PCIA agrees that exact replication of services rules from Part 22 to Part 90 -- or vice versa -- is not required under the *Budget Act*. Indeed, "existing technical and operational rules may reflect objective differences" consistent with *Budget Act* mandates. These objective differences, however, flow from two sources that have very different impacts on achieving the FCC's goals of regulatory parity among competitors. First, there exist a class of differential *technical* regulations that are based on the unique physical characteristics of various frequency bands in which services operate, the capabilities and limitations of service technologies, and the intended primary usage of a frequency band. Second, there are a class of differential *historical* regulations that are based on the need to accommodate the disparate regulatory structures under which licensees had been authorized, not all of which can be ameliorated to achieve a fully uniform licensing structure in the very near term.

While the Commission initially should consider both of these very pragmatic technical and historical considerations, the FCC has an overriding goal to ensure that its adopted policies do not place similarly situated service providers on an uneven regulatory footing with respect either to the provision of service to users or to competition with one another. Thus, PCIA agrees that evaluations of proposed rule eliminations, modifications, or retentions should emphasize the effect on competition and the costs likely to be incurred by substantially similar mobile service providers. These types of considerations have guided

PCIA's conclusions on specific operational and technical revisions, as discussed below, that can be achieved at the present time. These considerations should also guide future inquiries by the Commission into the CMRS regulatory structures as the effect of historical disparities becomes less meaningful. PCIA suggests that the FCC adopt a general presumption, in the long term, against maintaining differential regulations unless it is persuaded that the disparate regulation is of a technical, rather than historical, nature.

III. THE FCC SHOULD NOT ADOPT A CMRS SPECTRUM AGGREGATION LIMIT

The *Further Notice* proposes to adopt a general CMRS spectrum cap, set at 40 MHz and adjusted upward slightly.[12] In formulating this proposal, the Commission has voiced its concern that "licensees with the ability to acquire large amounts of CMRS spectrum in a given area could acquire excessive market power by potentially reducing the numbers of competing providers, not only within specific service categories but also in CMRS generally."[13] As discussed below, PCIA opposes the Commission's proposal and believes that the fears voiced in the *Further Notice* have no valid basis.

As an initial matter, in light of the Commission's conclusions regarding the competitiveness of the CMRS marketplace generally, there is no need to restrict the flexibility of licensees in this manner. In the *Second Report and Order*, the Commission determined that the various submarkets within the broader CMRS market, with the exception

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[12] *Id.*, ¶93.

[13] *Id.*, ¶89.

of the cellular market, were fully competitive.[14] Even for the cellular market, the Commission determined that significant deregulation was warranted.[15] Under these circumstances, a spectrum aggregation limit does not appear warranted.

In this regard, PCIA believes the paging market provides a model competitive service market and demonstrates that spectrum aggregation limits would only disserve the public interest. Today, there are approximately 2,400 paging companies operating throughout the United States -- on radio common carrier ("RCC") channels alone -- serving 19.8 million subscribers on a highly competitive basis:

- The industry is composed of hundreds of operations with fewer than 1,000 customers, and many more mid-sized companies with only a few thousand pagers in service. While there are some large carriers operating, consolidation is a relatively recent phenomenon and no individual company has more than 15 percent of the paging market. Only four companies have more than 5 percent of the market.

- RCCs compete for subscribers with other RCCs, for-profit Private Carrier Paging companies ("PCPs"), and with shared or individual private radio paging licensees. Soon, paging will also compete with new services offered via low-earth orbit satellites and through 900 MHz narrowband PCS systems.

- Increased retail marketing of pagers, resale, and other non-direct forms of distribution further intensify the competitive nature of the paging industry.

- Intense competition has driven paging rates downward and per pager monthly revenues have steadily declined. In fact, monthly per pager revenues dropped 50 percent between 1987 and 1992 (from an average of $25.80 per month in 1987 to $12.79 in 1992).

Part of the reason that paging is so competitive is the absence of entry barriers that characterize some other mobile services. Creation of spectrum caps will only create barriers

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[14] *Second Report and Order*, 9 FCC Rcd at 1467.

[15] *Id.*

to entry and may, in fact, disadvantage existing operators, who would be forced to compete against new broadband carriers that can use far more greater spectrum allocations to provide paging services on a flexible use basis.

Furthermore, a spectrum cap will have the effect of constraining existing carriers from entering new wireless markets. Static spectrum caps simply cannot keep pace with the dynamic and fluid nature of the wireless marketplace. Instead, spectrum aggregation limits, to the extent they may be deemed warranted at a later time, should be implemented on a service-specific basis as the FCC has done for PCS. These rules place limits on, for example, the amount spectrum entities may hold in: broadband PCS; narrowband PCS; cellular-broadband PCS. Addressing the levels of spectrum that may be permissibly assigned to any single entity in the context of specific services will produce a more reasoned treatment of spectrum limitation issues and competitive concerns.

Accordingly, PCIA believes that a general spectrum cap should not be adopted for CMRS.[16] There is no record basis supporting such a requirement. And, to the extent the FCC deems aggregation limits necessary as additional services are authorized, the Commission can establish service-specific regulations that are more narrowly tailored to the competitive goals the Commission seeks to further.[17]

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[16] In the event the Commission nonetheless imposes a general CMRS spectrum cap, it should be established in a way that does not preclude a single operator from holding licenses for both narrowband and broadband services within the same geographic service area. PCIA has consistently advocated permitting entities to participate in providing broadband as well as narrowband service offerings. The *Further Notice* apparently concurs in this conclusion. In addition, any spectrum aggregation cap should be limited to the initial authorization process to avoid creating artificial barriers to market driven consolidations.

[17] Finally, the complexity of the cap's implementation and application requires greater analysis and review than is possible in the short period of time in which the Commission must address the majority of *Further Notice* proposals. The Commission should not act too hastily on this issue, since its resolution is not required by August 10, 1994.

IV. REFORMING TECHNICAL AND OPERATIONAL RULES TO ACHIEVE COMPARABLE REGULATION FOR SUBSTANTIALLY SIMILAR CMRS OFFERINGS

A. Technical Rule Change Proposals

PCIA generally supports the proposals in the *Further Notice* for achieving comparability of technical regulations for substantially similar CMRS services. The efforts to reform technical regulations, however, are one area where the prior record developed in the *Part 22 Rewrite* can serve a particularly useful foundation. PCIA discusses below several instances where consideration of prior efforts to streamline and improve upon the existing Part 22 regulatory scheme appear to be warranted.

1. Channel assignment, service areas, and co-channel interference protection

In the *Further Notice*, the Commission devotes considerable discussion to reform of the Part 90 procedures for assigning the use of spectrum. While the suggestion to graft the present forms of Part 22 assignment procedures onto Part 90 will achieve a degree of comparability between like services, PCIA believes that this proceeding offers the potential for achieving more beneficial regulatory reforms that will benefit all CMRS licensees and ease the administrative burdens on the Commission. In particular, PCIA believes it is imperative for the Commission to adopt market area licensing for paging and other mobile telephone services and other reforms advocated in the *Part 22 Rewrite* proceeding.

Adopting a market-based exclusivity approach for paging and other mobile telephone services is long overdue. Such an approach would focus on a licensee's market area rather

than the location of its existing transmitters, and offers great benefits including reduced regulatory delays and costs, the encouragement of publicly beneficial wide area mobile services, elimination of gamesmanship through overfilings, and, as mandated by the *Budget Act*, minimizing mutually exclusive applications. In addition, at least in the paging context where entry barriers for new carriers are minimal, area wide exclusivity is highly unlikely to result in spectrum warehousing. PCIA notes that, in response to a NABER petition for rulemaking, the FCC has already established an exclusivity regime designed to facilitate the creation of local, regional, and nationwide PCP networks.[18] Under this proposal, if a PCP commits to deploy a sufficient number of transmitters in an area, no new authorizations for additional transmitters are granted to any other PCPs on that channel in that area. PCIA believes that such a scheme should be extended to RCC paging as well. Due to the need for expeditious action on market area licensing for paging systems, PCIA plans to submit a consensus proposal for the appropriate exclusivity regions, transmitter counts needed to obtain exclusivity, transitional provisions, and grandfathering in its reply comments in this proceeding.

PCIA also supports adopting the *Part 22 Rewrite* proposals permitting licensees to make certain minor changes to their facilities and operate additional transmitters without prior Commission approval or notification. In that proceedings, PCIA also suggested: (1) requiring Form 489 filings when a licensee *decreases* its outer composite service contour and (2) exploring the possibility of offering licensees the flexibility to construct sites without prior approval where the interference contour ("IC") and reliable service area contour

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[18] *900 MHz PCP Exclusivity Order*, 8 FCC Rcd 8318 (1993), *recon. pending.*

("RSAC") of the proposed station are totally surrounded, but not necessarily covered or encompassed, by an IC or RSAC of existing stations.[19] This policies should be adopted and applied to all CMRS licensees in this proceeding.

2. *Antenna height and power limits*

PCIA supports conforming height/power limits for functionally similar services. While PCIA concurs with the assessment in the *Further Notice* that the existing rules for height/power limits for Part 22 and Part 90 paging systems are already highly similar, in other cases, height/power limits can deviate between functionally similar services by substantial amounts.[20] Since these limits directly affect the economics of providing wide-area coverage, some degree of reform appears necessary, whether raising or lowering limits to achieve uniformity. As a practical matter, transitioning to lower height/power limits would entail significant cost burdens for existing operators, necessitate substantial system redesign, and likely disrupt service to the public. On the other hand, achieving consistency by raising -- to the extent technically feasible -- height/power limits to a uniform threshold is demonstrably workable in practice, offers greater technical flexibility to licensees, and can be accomplished relatively easily with proper licensee coordination. Accordingly, discrepancies in height/power limits should be reconciled by using the higher limits in all cases, subject only to technical constraints and limitations necessary to comply with frequency-dependent RF exposure limitations.

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[19] Telocator Comments, CC Docket No. 92-115 (filed Oct. 25, 1992) at 32-34 (citing 47 C.F.R. § 73.1201 (1993)) ("*Telocator Part 22 Rewrite Comments*").

[20] *Further Notice*, ¶49-52.

3. *Modulation and emission requirements/emission masks*

In the *Further Notice*, the Commission seeks comment on eliminating digital/analog and transmission mode emissions restrictions for CMRS operations.[21] In a related area, the FCC has proposed to retain the existing emission masks for CMRS services, subject to revisions viewed as necessary to create parity.[22] PCIA generally concurs with this approach, which offers licensees improved flexibility that could lead to the increased offering of innovative services for the public. In fact, this appears to be similar to the method used for Narrowband PCS operations, where licensees were accorded great technical flexibility subject only to an emission mask to ensure non-interference with adjacent channel operations.[23]

In this regard, PCIA also believes the FCC could feasibly add to the flexibility of CMRS providers, as it has done in the Narrowband PCS context, by altering the emission mask in cases where the same entity operates two or more adjacent channels. In the Narrowband PCS rules, carriers operating aggregated adjacent channels must adhere to a predefined attenuation profile only where their operations are adjacent to a third party.[24] In this manner, a narrowband PCS operator authorized on two adjacent 25 kHz channels is permitted to use the spectrum as a single 50 kHz channel with an occupied bandwidth of up to 45 kHz, rather than as two 25 kHz channels with an occupied bandwidth of only 40 kHz.

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[21] *Id.*, ¶55.

[22] *Id.*, ¶43-44.

[23] *Narrowband PCS Order*, 8 FCC Rcd 7162, 7170-71 (1993), *recon.* 9 FCC Rcd 1309 (1994).

[24] *Id.*, 8 FCC Rcd at 7071.

This approach offers greater spectral efficiency and more technical flexibility, and PCIA recommends adopting this approach for all similarly situated CMRS licensees.

4. Interoperability

The *Further Notice* solicits comment on whether it is necessary or advisable to develop interoperability requirements for CMRS operations.[25] PCIA opposes any such suggestion. Today's paging industry is highly competitive and boasts a rich variety of innovative service offerings in the absence of federally-mandated compatibility standards. Indeed, paging companies have aptly demonstrated their ability to coalesce rapidly to form industry standards where necessary and appropriate without regulatory oversight. PCIA thus does not believe any interoperability standards are warranted or needed.

B. Operational Rule Change Proposals

PCIA generally supports the Commission's efforts to balance the operational rules that apply to Part 90 and Part 22 CMRS operators, and commends the Commission for the completeness of the *Further Notice* in identifying where such discrepancies exist. By and large, PCIA also believes that these issues are relatively non-controversial and can be implemented with a minimum of difficulty. As discussed below, where options for equalizing regulations exist, PCIA has generally supported the alternatives that offer greatest flexibility to licensees in providing diverse services to the public.

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[25] *Further Notice*, ¶56-57.

1. Construction period and coverage requirements

The Commission has proposed a 12 month basic construction timetable for all CMRS licensees.[26] PCIA supports this time period in lieu of the eight month period currently prescribed for most Part 90 services. As an initial matter, 12 months appears to be a reasonable period of time, taking into account operational as well as practical considerations (such as weather, site accessibility, and tower construction arrangements) that may affect licensees' ability to schedule facility installation on a timely basis. Indeed, 12 month construction periods are already used for some Part 90 services.[27]

If the Commission adopts market area licensing as advocated by PCIA,[28] extended implementation periods may be appropriate in lieu of the 12 month construction period. In essence, in exchange for a carrier's commitment to develop networks capable of providing service to extended geographic areas, PCIA believes the Commission should allow such construction to proceed on a "slow growth" basis. Although PCIA does not believe that spectrum warehousing would be a tremendous concern given the availability of paging channels, PCIA nonetheless recommends that the Commission specify coverage requirements, set minimum numbers of transmitters to be constructed, and require the posting of performance bonds. The precise nature of such safeguards may well depend upon the service areas adopted and the type of service at issue.

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[26] *Id.*, ¶62.

[27] 47 C.F.R. §90.631(e)-(f) (1993)

[28] *See* §IV.A.1, *infra.*

The *Further Notice* proposes that licensees not only complete construction but also commence service by the end of the period.[29] PCIA believes that the Commission's proposal -- to provide service to at least two third parties -- is too restrictive and fails to take into account marketplace realities. In lieu of that proposal, PCIA recommends that a licensee be deemed to have met this requirement if it has constructed the facilities and they are interconnected to the public switched telephone network (and thus available for service)[30] *or* it is providing service to at least two unaffiliated parties. This requirement recognizes the need for licensees to undertake and be successful with marketing plans before they have any actual subscribers.

As a related matter, the Commission should also conform the rules applicable to temporary discontinuance of service. Under Part 22, a licensee may discontinue service for up to 90 days (with a possible additional 30 days available under certain circumstances) without resulting in license cancellation.[31] This provision contrasts with Part 90, under which licensees may discontinue service for up to one year without facing license cancellation.[32] Because 90 days appears to be an adequate period of time to accommodate equipment and other disruptions beyond the control of the licensee and discourages

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[29] *Further Notice*, ¶63.

[30] *See Telocator Part 22 Rewrite Comments* at 17, Attachment B, Proposed Rule § 22.99 (proposing to define "service to the public" as "the facilities authorized by the Commission have been constructed in accordance with the Commission's Rules and are either (1) actually providing service to customers or (2) if no customers are yet using the facilities, are fully capable of providing service within a reasonable period of time following a request by a representative of the Commission and are available to customers upon their request").

[31] 47 C.F.R. § 22.303 (1993).

[32] 47 C.F.R. § 90.157 (1993). Although the Part 90 temporary discontinuance period recently has been shortened to 60 days, full implementation of that policy currently is being held in abeyance. *See 900 MHz SMRS Phase II*, FCC 93-279 (rel. May 29, 1993).

warehousing of frequencies, PCIA recommends reforming Part 90 to accord with the Part 22 temporary discontinuance of service time limits.

2. Loading requirements

The *Further Notice* tentatively proposes to do away with most channel loading requirements, suggesting that "spectrum warehousing can be adequately addressed by other means."[33] Consistent with its comments in the *Part 22 Rewrite*,[34] where the Commission proposed to delete the functionally similar traffic studies for obtaining additional Part 22 channels, PCIA supports the Commission's proposal. Traffic studies are, as noted in the *Further Notice*, "not a reliable indicator of efficient channel usage,"[35] especially in cases where carriers have deployed cellular re-use networks. Moreover, spectrum warehousing concerns are less meaningful in a competitive bidding era where licensees must pay for the spectrum they are licensed to use. In such circumstances, there are strong incentives against allowing spectrum to lie fallow, and loading requirements and traffic studies appear redundant and unnecessary.

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[33] *Further Notice*, ¶70.

[34] *Telocator Part 22 Rewrite Comments* at 39-40.

[35] *Further Notice*, ¶69.